

ZONING BOARD OF APPEALS MINUTES

August 6, 2013 – Special Meeting
Delta Township Administration Building

I CALL TO ORDER

Vice Chairman Barnhart called the meeting to order.

II PLEDGE OF ALLEGIANCE

Vice Chairman Barnhart led the Board and others present in reciting the Pledge of Allegiance to the Flag.

III ROLL CALL

Members Present: Arking, Barnhart, Laforet, Newman, and Parr

Members Absent: Hicks and Reed - excused

Others Present: Community Development Director Mark Graham and Assistant
Community Development Director Gary Bozek

IV SET AND ADJUST AGENDA

Mr. Barnhart asked if there were any changes to the agenda.

Mr. Arking said some of the agendas were sent out with the date of July 9th and that the agenda should be corrected to read August 6th.

V APPROVAL OF MINUTES

**MOTION BY PARR, SECONDED BY NEWMAN, THAT THE JULY 9, 2013
REGULAR MEETING MINUTES BE APPROVED. VOICE VOTE. CARRIED 6-0.**

VI NEW BUSINESS

CASE NO. V-13-3-20: Karla J. Kamrada, 10979 Knockaderry Drive, Grand Ledge, Michigan 48837, is requesting a variance from regulations contained in Section 3.4.0 D. of the Delta Township Zoning Ordinance, in order to allow the placement of a deck and swimming pool within a designated 100-year flood plain area, on the subject parcel.

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Mr. Bozek noted that staff had provided the Board with an aerial photo illustrating the location of the subject parcel at the southwest corner of Knockaderry and St. Joe Highway. He noted that the subject parcel was zoned RB, Low Density Residential, as well as the surrounding parcels, with the exception of a commons area located to the south which served as a storm drain detention area. Mr. Bozek said at the time the subdivision was platted in 2001, there was no flood plain designation on the subject parcel and in 2010, FEMA (Federal Emergency Management Agency) amended the flood plain map and a portion of the subject parcel was placed within the 100-year flood plain. He noted that in September, 2012, a building permit was issued to the applicant to construct a house based on the information illustrated on the original plat drawing and after the house was constructed, it was realized that the southwest corner of the house encroached on a small portion of the flood plain. Mr. Bozek noted that after discovering the encroachment, the applicant retained a civil engineering consulting firm to prepare a Letter of Map Amendment (LOMA) application to submit to FEMA in order to remove the property out of the flood plain which was pending. He pointed out that FEMA's action was not likely to take into account the pool and deck the applicant had proposed which was the issue before the Board this evening.

Mr. Bozek noted that Section 3.4.0 D of the Zoning Ordinance provided a variance process that allowed the placement of structures within the 100-year flood plain provided that certain criteria could be met. He indicated that the staff report provided to the Board addressed specific flood plain site development standards and specific criteria for placing structures and constructing within the flood plain. Mr. Bozek indicated that there were things the applicant could do that would allow the placement of a pool and deck within the flood plain, one of which was to fill the flood plain in order to elevate the deck and pool out of the 100-year flood plain and provide compensating excavation which would lower a portion of the lot to maintain the flood carrying capacity of the lot. Mr. Bozek noted that the applicant had provided documentation to the Board noting the area that would be filled and the area that would be excavated. The Board had been provided with an updated drawing that had been prepared by the applicant's engineer that showed an area where 32 cubic yards of fill would be placed and an excavated area of 35 cubic yards which would result in an improved flood carrying capacity on the subject parcel.

Mr. Bozek informed the Board that in order for the fill activity to take place, the Michigan Department of Environmental Quality (MDEQ) needed to issue a permit to fill in the flood plain or issue a statement indicating that they didn't have the authority to grant such approval. Mr. Bozek said in this case, approval fell upon the municipality to make a determination whether or not the fill activity should be allowed. The Board had been provided with letters from the MDEQ stating that they didn't have any authority as it related to the house, as well as a follow-up e-mail indicating that they didn't have any authority relating to the pool and deck. Mr. Bozek informed the Board that the applicant had provided other pieces of documentation that was required being a flood plain elevation certificate. He said there were also a number of construction standards contained in the Zoning Ordinance, but those were primarily for changes made to habitable structures and that a pool or deck

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would not fall within those criteria. Mr. Bozek said in addition to the applicant meeting the criteria specific to the flood plain, the applicant was required to meet the basic conditions for granting a variance, as well as one special condition.

Mr. Arking questioned if the deck was big enough to require a building permit.

Mr. Bozek said decks required building permits if they were at or above a certain height.

Ms. Laforet inquired about the location of the flood plain further to the west.

Mr. Bozek noted that the flood plain followed the 851 foot elevation which meandered across the subject parcel and other lots within the northern portion of the subdivision. He noted that there were map amendments pending with FEMA for three or four lots within the subdivision.

Ms. Laforet asked if the area had experienced any major flooding in the past.

Mr. Bozek noted that the Pointe West subdivision had experienced some flooding further to the east which had to do with storm drain issues and not the flood plain.

Karla Kamrada, 10979 Knockaderry Dr., said the pool was being constructed for her daughter who had special needs so that she could get exercise. Ms. Kamrada noted that when they were looking at different properties in the area, they knew that they wanted to live in the Grand Ledge area and they sought a lot that had a flat backyard that would accommodate a pool. She noted that they obtained a copy of the subdivision by-laws, as well as the Township's requirements, before they decided to purchase their lot. Ms. Kamrada said they had been working with their engineer to remove the house out of the flood plain and resolve this matter so that they could utilize their backyard and build a pool and deck.

Ms. Kamrada proceeded to review the four basic conditions for granting a variance by noting that the variance shall not be contrary to the public interest or to the intent and general purpose of the Zoning Ordinance. The intent of the flood plain regulations is to protect the public health, safety, and welfare. The flood plain regulations provide standards and safeguards, such as compensating excavation that aims to preserve the base flood carrying capacity, thus protecting public health, safety, and welfare. Ms. Kamrada noted that they would be excavating more than what they would be filling in. The variance shall not permit the establishment within a district of any use which is not permitted by right or special land use permit. A deck and pool are permitted residential accessory uses/structures in the RB, Low Density Residential, zoning district. Ms. Kamrada noted that they had researched the Township's regulations, as well as the subdivision by-laws, to determine whether they would be able to construct a pool before they purchased their lot and what would be required. The variance shall not cause an adverse effect on properties in the immediate vicinity or in the zoning district in which the subject parcel is located. The base flood carrying capacity will

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be improved as a result of the compensating excavation proposed on the subject parcel. Thus, there would be no adverse effects on properties in the immediate vicinity or within the RB zoning district as a whole. Ms. Kamrada reiterated the fact that they would be compensating for more than what they were filling. The variance shall relate only to the property described in the application for the variance. Ms. Kamrada noted that the variance request only applied to her lot.

Ms. Kamrada felt her variance request met Special Condition #1, where there are practical difficulties or unnecessary hardships which prevent carrying out the strict letter of the ordinance. These hardships or difficulties shall not be deemed solely economic, but shall be evaluated in terms of the use of a particular parcel of land. She felt it could be argued that in this particular case, the entire backyard was within the 100-year flood plain and that, absent a variance, it was virtually unusable. She said none of the traditional accessory structures could be erected, thereby hindering the activities typically associated with a single family property. Ms. Kamrada said when they first discovered that their home was within the flood plain, she became very concerned about the investment they had made into their home and whether they would ever be able to sell their home. Ms. Kamrada didn't feel that there would be any other issues due to the fact that the subdivision by-laws didn't allow outbuildings and that a deck and pool were typical activities associated with single family homes.

Mr. Arking asked when the applicant became aware of the fact that her home was within the flood plain.

Ms. Kamrada said they were unaware that their home was within the flood plain until they were working with their lender who had informed them that they were within the flood plain.

Chris Kamrada, 10979 Knockaderry Drive, said the flood plain designation was made in 2010 and they purchased their property from the builder in 2012. He said at that time, the builder, or the original owner of the property, had claimed that they didn't have any knowledge of the flood plain and that it wasn't until their lender had pointed it out that they become aware that their parcel was within the flood plain. Mr. Kamrada said at that time, it had been determined that the southeast corner of the house was lower than the flood plain due to the installation of lookout windows. He said they were required to modify their building plans and install a retaining wall and window wells in order to apply for a loan. He informed the Board that if a Letter of Map Amendment was not granted by FEMA, they would have to pay for high risk flood insurance and that all of this had transpired after the house was constructed and they were already committed to purchasing the home.

Mr. Newman questioned if the applicant had received any opposition from his neighbors regarding this issue

Ms. Kamrada noted that she had received an e-mail from the neighbors to the south inquiring

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about the variance request. She noted that once she explained their plans, the neighbors had no objections.

Ms. Laforet said due to her experience in real estate, she was aware of the fact that when FEMA amended the flood plain maps, it caused havoc all over the country because people that were never located within a flood plain now had to pay very expensive flood insurance and in some cases where properties hadn't closed, literally overnight there were perspective homeowners that automatically didn't qualify for their mortgage because their payments would be too high. Ms. Laforet said she also had some personal experience in that she had purchased a condo several years ago on the west side of the State which was also considered to be in the flood plain and that she basically had to do what the Kamrada's were having to do. Ms. Laforet felt the Kamrada's had followed the correct process and were doing everything that was required and she personally didn't see any reason why the Board shouldn't grant the variance. She said it was her understanding that the site improvements the Kamrada's were doing would actually improve drainage on the site.

Mr. Barnhart asked if there was anyone in the audience who would like to speak on this matter.

Katherine Huycke, 7246 E. St. Joe Highway, said she owned the property directly to the west of the subject parcel and she questioned how close the pool and deck would be from her property line.

Mr. Bozek said the pool would be located approximately 75 feet away from the common property line.

Ms. Huycke questioned how close to the property line could excavation take place.

Mr. Bozek said there wasn't a particular setback requirement for excavation, but in this case, the areas to be excavated would be approximately 30 feet from the property line at the closest point.

Ms. Huycke noted that it had been mentioned earlier in the meeting that the proposed compensating excavation would not have any negative effects on properties in the immediate vicinity; however she questioned what would happen if more flooding occurred than what had been experienced in the past.

Mr. Bozek said he couldn't say what type of event in terms of rain would cause flooding or that there were any guarantees that the area wouldn't flood if it remained the same. He said the engineer had designed the fill area to meet the 100-year based flood.

Mr. Barnhart asked Ms. Huycke if she had ever experienced flooding on her property.

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Ms. Huycke said she had experienced extreme flooding on her property before the Myers-Henderson storm drain improvements were made. She noted that the flooding situation in the area had improved since the storm drain improvements were made, but she had experienced standing water on her property approximately four years ago.

MOTION BY PARR, SECONDED BY ARKING, THAT THE PUBLIC HEARING BE CLOSED. VOICE VOTE. CARRIED 5-0.

Mr. Arking asked if it was his understanding that other applications to amend the flood plain designation had been approved by FEMA.

Mr. Bozek said that was correct and that there had been several lots that had applied for Letters of Map Amendment that had been granted by FEMA. He noted that three lots were in the immediate vicinity of the applicant's lot.

Mr. Arking questioned if there were remedies to offer other homeowners if a variance of this nature was granted and there was a residual effect on other property owners.

Mr. Bozek said part of the purpose of hiring an engineering consultant was to take those precautions and account for at least a 100-year storm.

MOTION BY PARR, SECONDED BY NEWMAN, THAT IN CASE NO. V-13-3-20, KARLA KAMRADA, 10979 KNOCKADERRY DRIVE, GRAND LEDGE, MICHIGAN 48837, A VARIANCE REQUEST FROM REGULATIONS CONTAINED IN SECTION 3.4.0 D OF THE DELTA TOWNSHIP ZONING ORDINANCE, IN ORDER TO ALLOW THE PLACEMENT OF A DECK AND SWIMMING POOL WITHIN A DESIGNATED 100-YEAR FLOOD PLAIN AREA, ON THE SUBJECT PARCEL BE APPROVED FOR THE FOLLOWING REASONS:

- 1. THE APPLICANT HAS SATISFIED ALL FOUR OF THE BASIC CONDITIONS SET FORTH IN THE ZONING ORDINANCE, AND SPECIAL CONDITIONS #1, WHERE THERE ARE PRACTICAL DIFFICULTIES OR UNNECESSARY HARDSHIPS WHICH PREVENT CARRYING OUT THE STRICT LETTER OF THIS ORDINANCE. THESE HARDSHIPS OR DIFFICULTIES SHALL NOT BE DEEMED SOLELY ECONOMIC, BUT SHALL BE EVALUATED IN TERMS OF THE USE OF A PARTICULAR PARCEL OF LAND, AND SPECIAL CONDITION #4, WHERE SUCH VARIATION IS NECESSARY FOR THE PRESERVATION OF A SUBSTANTIAL PROPERTY RIGHT POSSESSED BY OTHER PROPERTIES IN THE SAME ZONING DISTRICT.**

VOICE VOTE. CARRIED 5-0.

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VII. OLD BUSINESS

Zoning Ordinance Appeal: Mr. Aaron Long, owner of the property at 215 ½ Winifred Avenue, is appealing the Zoning Administrator's decision regarding Sections 3.5.0 and 24.2.0 (D) of the Zoning Ordinance.

Mr. Graham said this request had gone before the Board on July 9th at which time several Board members suggested the possibility of obtaining an attorney's opinion based on some of the statements made in his staff report. Mr. Graham said he subsequently followed up on the Board's request and wrote a letter to the Township's Attorney and received a response from the attorney on July 17th that he had provided to Board members. He noted that Board members were also provided with several documents pertaining to this request, as well as the minutes of the July 9th Zoning Board of Appeals meeting. Mr. Graham informed Board members that the subject parcel was unique in that two houses existed on the site, one located to the front and one located to the rear of the property, that were both constructed in 1947. He noted that the property was purchased by the applicant from his father in 2005 at which time the applicant renovated the front house and went through the Township's licensing procedures in order to legalize the house as a rental unit.

Mr. Graham indicated that the house to the rear of the property was utilized as a house at one time and that Mr. Long would like to remodel the building and also make it into a rental unit. He noted that there would be no exterior remodeling of the house other than paint and a new roof and that the interior of the building would be completely remodeled. Mr. Graham said Board members were provided two motions this evening, one that affirmed his decision as Township Zoning Administrator regarding the residential occupancy of a second building would constitute a second dwelling on the site, and the second motion that would be a reversal of the Zoning Administrator's decision. Mr. Graham pointed out that his opinion was written on May 28th and then approximately one month later, staff received information from the Township Attorney regarding abandonment and non-conforming uses. He said the basis for his motion to reverse his decision was based on the Attorney's opinion.

Ms. Parr questioned if the applicant had replaced the plumbing and electrical in the house to the rear, as well as construct a wall between the house and the garage.

Aaron Long, owner of the property at 215 ½ Winifred, noted that there were walls inside of the house that were only studs and no drywall, but the wall that was located between the garage and the house was dry walled which constituted a fire wall. Mr. Long said there was no plumbing or furnace in the home and that the electrical system would have to be redone and brought up to code. He noted that the entire interior of the house would have to be redone. Mr. Aaron noted that the house was on a cement slab and that there was a small area of the house where a furnace and hot water heater were located.

MOTION BY NEWMAN, SECONDED BY ARKING, THAT THE PUBLIC HEARING BE CLOSED. VOICE VOTE. CARRIED 5-0.

MOTION BY LAFORET, SECONDED BY PARR, THAT IN THE CASE OF AARON LONG'S APPEAL OF THE ZONING ADMINISTRATOR'S DECISION, FILED ON MAY 30, 2013, REGARDING THE RESIDENTIAL OCCUPANCY OF A SECOND BUILDING AT 215 WINIFRED, THAT THE DELTA TOWNSHIP ZONING BOARD OF APPEALS REACH THE FOLLOWING FINDINGS OF FACT:

- 1. ON JULY 18, 1946 A DELTA TOWNSHIP ZONING ORDINANCE WAS ADOPTED AND THE LOTS ON WINIFRED AVENUE (BEING OAK PARK NO. 1 SUBDIVISION) WERE ZONED C, RESIDENTIAL. THE C, RESIDENTIAL, DISTRICT PERMITTED "TWO OR MORE SEPARATE BUILDINGS FOR DWELLING PURPOSES ERECTED OR PLACED ON THE SAME LOT". THE DELTA TOWNSHIP ASSESSING DEPARTMENT RECORDS INDICATE THAT BOTH HOMES WERE BUILT AT 215 WINIFRED IN 1947. THEREFORE, THE ZONING ORDINANCE PERMITTED TWO HOUSES ON ONE LOT AT THE TIME THE TWO HOUSES WERE CONSTRUCTED AND THE HOMES ATTAINED "LEGAL NON-CONFORMING USE" STATUS AT THE TIME A NEW ZONING ORDINANCE WAS ADOPTED IN 1952 WHICH PROHIBITED TWO HOUSES ON ONE LOT.**
- 2. INFORMATION PROVIDED ON THE 1969 DELTA TOWNSHIP ASSESSING DEPARTMENT RECORDS REFER TO SECOND BUILDING AT 215 WINIFRED AS "4 ROOMS & BATH, SOME FINISH". THE 2005 RECORDS REFER TO THE EXISTENCE OF "A BATH, KITCHEN & 2 BEDROOMS" IN THE SECOND BUILDING.**
- 3. THE ZONING ORDINANCE DEFINES A DWELLING UNIT AS: "A BUILDING, OR ENCLOSED PORTION THEREOF, DESIGNED FOR OCCUPANCY BY ONE FAMILY FOR RESIDENTIAL PURPOSES AND HAVING INDEPENDENT LIVING, EATING, SLEEPING, COOKING AND SANITARY FACILITIES". THE SECOND BUILDING MEETS THE ZONING ORDINANCE DEFINITION OF A DWELLING UNIT.**
- 4. ON JUNE 25, 2013 THE TOWNSHIP ATTORNEY OFFERED THE FOLLOWING OPINION:**

"MERELY DISCONTINUING A NON-CONFORMING USE FOR A PERIOD OF 90 DAYS, OR EVEN 18 MONTHS, IS NOT SUFFICIENT TO PROVE A NON-CONFORMING USE HAS BEEN ABANDONED. THE

“ABANDONMENT” OF A PROPER RIGHT “IS THE VOLUNTARY RELINQUISHMENT THEREOF BY ITS OWNER OR HOLDER, *WITH THE INTENTION* OF TERMINATING HIS OWNERSHIP, POSSESSION, AND CONTROL, AND WITHOUT VESTING OWNERSHIP IN ANY OTHER PERSON.” *RUDNIK V MAYERS*, 387 MICH 379, 384 (1972). THUS, THE NECESSARY ELEMENTS OF ABANDONMENT OF A NON-CONFORMING USE “ARE INTENT AND SOME ACT OR OMISSION ON THE PART OF THE OWNER OR HOLDER WHICH CLEARLY MANIFESTS HIS VOLUNTARY DECISION TO ABANDON.” *RUDNIK*. THE MICHIGAN SUPREME COURT, IN A COMPANION CASE, STATED:

ABANDONMENT IN THE CONTEMPLATION OF THE LAW IS SOMETHING MORE THAN MERE NONUSER. IT IS RATHER A NONUSER COMBINED WITH AN INTENTION TO ABANDON THE RIGHT TO THE NON-CONFORMING USE. THE BURDEN OF PROVING ABANDONMENT WAS ON THE CITY. IT INTRODUCED NO EVIDENCE FROM WHICH IT WOULD BE REASONABLE TO CONCLUDE THAT THE PLAINTIFF EVER INTENDED TO RELINQUISH OR ABANDON HIS VESTED RIGHT TO USE HIS PROPERTY IN THE MANNER IN WHICH IT WAS BEING USED PRIOR TO THE RESIDENTIAL ZONING AMENDMENT. *DUSDAL V WARREN*, 387 MICH 3543 (1972)

THE MICHIGAN COURT OF APPEALS HAS HELD AN ORDINANCE THAT DEFINES THE ABANDONMENT OF A NON-CONFORMING USE SOLELY ON THE BASIS OF DISCONTINUING THE VALID NON-CONFORMING USE FOR A PERIOD OF ONE YEAR WAS IN DIRECT CONTRAVENTION OF THE MICHIGAN SUPREME COURT HOLDINGS IN *DUSDAL* AND *RUDNIK*. SEE *LIVONIA HOTEL, LLC V CITY OF LIVONIA*, 259 MICH APP 116, 128 (2003).

- 5. IT IS OUR FINDING THAT THE NON-CONFORMING USE HAS NOT BEEN ABANDONED. MR. LONG HAS MAINTAINED THE ELECTRICAL SERVICE TO THE BUILDING AND THE PLUMBING AND INTERIOR WALLS REMAIN. THE “BACK” HOUSE SHARES A GAS SERVICE, WATER SERVICE AND A SINGLE SANITARY SEWER LEAD. MR. LONG HAS EXHIBITED NO INTENT TO RELINQUISH OR ABANDON HIS VESTED RIGHT TO THE USE OF THE SECOND BUILDING AS A DWELLING UNIT PRIOR TO THE 1952 ZONING ORDINANCE AMENDMENT WHICH PROHIBITED TWO HOUSES ON ONE LOT.**

THEREFORE, THE ZONING BOARD OF APPEALS REVERSES THE DECISION OF THE ZONING ADMINISTRATOR AND FINDS THAT THE RESIDENTIAL OCCUPANCY OF A SECOND BUILDING AT 215 WINIFRED IS PERMITTED.

VOICE VOTE. CARRIED 5-0.

VIII. OTHER BUSINESS - None

IX STAFF COMMENTS

Mr. Graham reminded Board members of their meeting next Tuesday, August 13th.

X BOARD COMMENTS

XI ADJOURNMENT

Vice Chairman Barnhart adjourned the meeting at 6:53 p.m.

DELTA CHARTER TOWNSHIP

Mary Clark, Secretary to the Zoning Board of Appeals

Minutes prepared by Anne Swink